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REMARKSClaim Rejections - 35 USC §102

Claims 50-55, 63-68, 70, 71 and 73-81 have been rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent No. 5,928,139 to Koros et al. It is well established that "an invention is anticipated if the same device, including all the claim limitations, is shown in a single prior art reference. Every element of the claimed invention must be literally present, arranged as in the claim." Richardson v. Suzuki Motor Co. Ltd., 9 USPQ.2d 1913, 1920 (Fed. Cir. 1989).

The entire basis regarding the rejection of the pending claims is set forth in a single paragraph on page 2 of the Office Action. Specifically, the Office Action states that Koros discloses a retractor assembly "having a blade (54), a body (32), and first and second enlarged edges (52) extending in an axial direction forming a channel nested in between (approximately 76/78) to maintain the retractor in a predetermined position relative to the body, or for slidable movement" and "first and second supporting members (82) that support a pin (83) that helps to position the blade relatively. The retractor also has a handle portion (34) that sits relative to the other parts of the device. The device also has a distracter tip (60) to facilitate insertion."

Claim Amendments

The Applicant has cancelled independent claims 50 and 71 without prejudice for possible submission in a continuing application, and dependent claims 51, 55, 73, 79 and 81 have been rewritten in independent form. Claims 53, 63, 65 and 70 have also been amended to depend from rewritten independent claim 51 in view of the cancellation of independent claim 50, and claim 76 has been amended to depend from rewritten independent claim 73 in view of the cancellation of independent claim 71.

Additionally, new claims 82 and 83 have been added which depend from rewritten independent claims 51 and 73, respectively. The subject matter recited in newly added claims 82 and 83 is described in paragraph [0155] of the published version of the subject application which discloses that "pin 336 includes threads for threading engagement in internal threads of the supporting member 349". New claims 84 and 85 have also been added which depend from

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rewritten independent claims 79 and 81, respectively. The subject matter recited in newly added claims 84 and 85 is illustrated in Figures 30 and 30a of the subject application where the rounded distal end of the distractor tip 344 comprises a convex curvature transitioning to the width of the distractor tip.

Rewritten Independent Claim 51 and Dependent Claims 52-54, 63-65, 70 and 82

Rewritten independent claim 51 recites, among other elements and features, a retractor body including "first and second enlarged edges . . . defining a channel therebetween" and "at least one supporting member mounted thereon for attaching a retractor pin, and a retractor pin attached to a first one of the at least one supporting member for fixedly positioning the retractor blade relative to the neurostructure", and a retractor blade received within the channel defined by the retractor body and nested between and engaged with the first and second enlarged edges to maintain the retractor blade in a predetermined position relative to the retractor body.

Even assuming arguendo that either of the upper portions 44, 66 of the Koros device could be construed as a retractor body, and that the outer features 50, 52 and 68, 70 could be construed as "first and second enlarged edges . . . defining a channel therebetween" for receiving the blade portions 54, 64, the upper portions 44, 66 of the Koros device do not include "at least one supporting member . . . for attaching a retractor pin, and a retractor pin attached to a first one of the at least one supporting member", as recited in independent claim 51. Instead, it is the blade portion 64 that includes the element 82 which has been construed as "a supporting member" for receiving the screw 83, which is the element that has been asserted to constitute "a pin". Indeed, the upper portions 44, 66 of the Koros device clearly do not include any structure that could be construed as "supporting member" for attachment of the screws 83. Additionally, the lower blade portion 64 which defines the elements 82 does not include "first and second enlarged edges . . . defining a channel therebetween" that receives a retractor blade, as recited in independent claim 51.

For at least these reasons, Koros fails to disclose each and every element recited in independent claim 51, and therefore does not anticipate independent claim 51. Accordingly, the Applicant respectfully requests withdrawal of the rejection of rewritten independent claim 51 and allowance of the same.

Claims 52-54, 63-65, 70 and 82 depend either directly or indirectly from rewritten independent claim 51 and are submitted to be patentable for at least the reasons set forth above in support of the patentability of independent base claim 51. Additionally, further reasons support the patentability of these claims. For example, claim 52 recites that "the at least one supporting member defines a hollow tube for receiving the retractor pin". However, the upper portions 44, 62 of Koros, which have been construed as supporting members, do not include a hollow tube for receiving the screws 83.

Claim 54 recites that "the retractor pin has a handle and a shaft disposed between the pin and the handle and slideably received in the at least one supporting member". However, the screw 83 of Koros, which is the element that has construed as "a pin", does not include "a handle". Moreover, the Office Action does not set forth any grounds whatsoever as to how Koros discloses a retractor pin having a handle. Although the Office Action refers to the boss 36 extending from the upper portion 44 of the Koros device as "a handle portion", the boss 36 is not in any way associated with the screws 83. Accordingly, a *prima facie* case of anticipation has not been established with regard to claim 54.

Additionally, claim 82 recites that "the retractor pin includes external threads that are threadingly engaged with internal threads defined by the at least one supporting member". However, the screws 83 of Koros do not include external threads that are threadingly engaged with internal threads defined by the guides 82 of the blade portion 64, which are the features that have been construed as "supporting members".

Rewritten Independent Claim 55 and Dependent Claims 66-68

Rewritten independent claim 55 recites, among other elements and features, a retractor body including "first and second enlarged edges . . . defining a channel therebetween" and "a first supporting member and a second supporting member . . . positioned on opposite sides of the channel . . . and adapted for attaching a first and a second retractor pin, respectively" and "the first retractor pin being attached to the first supporting member and the second retractor pin received for movement within the second supporting member", and a retractor blade received within the channel defined by the retractor body and nested between and engaged with the first

and second enlarged edges to maintain the retractor blade in a predetermined position relative to the retractor body.

As indicated above, even assuming arguendo that either of the upper portions 44, 66 of the Koros device could be construed as a retractor body, and that the outer features 50, 52 and 68, 70 could be construed as "first and second enlarged edges . . . defining a channel therebetween" for receiving the blade portions 54, 64, the upper portions 44, 66 of the Koros device do not include "a first supporting member and a second supporting member . . . positioned on opposite sides of the channel" with a first retractor pin "attached to the first supporting member" and a second retractor pin "received for movement within the second supporting member", as recited in independent claim 55. Instead, it is the blade portion 64 that includes the element 82 which has been construed as "a supporting member" for receiving the screw 83. Indeed, the upper portions 44, 66 of the Koros device clearly do not include any structures that could be construed as first and second supporting members positioned on opposite sides of a channel for attachment to the screws 83. Additionally, the lower blade portion 64 which defines the elements 82 does not include "first and second enlarged edges . . . defining a channel therebetween" that receives a retractor blade, as recited in independent claim 55.

For at least these reasons, Koros fails to disclose each and every element recited in independent claim 55, and therefore does not anticipate independent claim 55. Accordingly, the Applicant respectfully requests withdrawal of the rejection of rewritten independent claim 55 and allowance of the same.

Claims 66-68 depend either directly or indirectly from rewritten independent claim 55 and are submitted to be patentable for at least the reasons set forth above in support of the patentability of independent base claim 55. Additionally, further reasons support the patentability of these claims. For example, claims 67 and 68 each recite "the first and second supporting members define the first and second enlarged edges of the retractor body engaged with the retractor blade". However, the feature 82 of Koros, which the Office Action has construed as "a supporting member", does not also define the features 58, which the Office Action has construed as "first and second enlarged edges".

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Rewritten Independent Claim 73 and Dependent Claims 74-78, 80 and 83

Rewritten independent claim 73 recites, among other elements and features, a retractor body including "first and second support members defining a channel therebetween and each support member having an enlarged edge extending . . . along the channel" with "a first pin receivable within a first opening in the first support member and a second pin receivable within a second opening in the second support member", and a retractor blade received within the channel and nested between and engaged with each of the enlarged edges.

As indicated above, even assuming arguendo that either of the upper portions 44, 66 of the Koros device could be construed as a retractor body defining a channel, and that the outer features 50, 52 and 68, 70 could each be construed as "an enlarged edge extending . . . along the channel" for receiving the blade portions 54, 64, the upper portions 44, 66 of the Koros device do not include "first and second support members" with "a first pin receivable within a first opening in the first support member and a second pin receivable within a second opening in the second support member", as recited in independent claim 73. Instead, it is the blade portion 64 that includes the elements 82 which have been construed as "first and second support members" including an opening for receiving the screw 83 (which has been construed as "a pin"). Indeed, the upper portions 44, 66 of the Koros device clearly do not include any structures that could be construed as first and second supporting members defining first and second openings which receive first and second pins. Additionally, the lower blade portion 64 which defines the elements 82 does not also include support members that each have "an enlarged edge" extending along a channel which receives a retractor blade, as recited independent claim 73.

For at least these reasons, Koros fails to disclose each and every element recited in independent claim 73, and therefore does not anticipate independent claim 73. Accordingly, the Applicant respectfully requests withdrawal of the rejection of rewritten independent claim 73 and allowance of the same.

Claims 74-78, 80 and 83 depend either directly or indirectly from rewritten independent claim 73 and are submitted to be patentable for at least the reasons set forth above in support of the patentability of independent base claim 73. Additionally, further reasons support the patentability of these claims.

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For example, claim 74 recites that "the second pin includes a handle and a shaft extending therefrom, the shaft comprising the second pin received in the second opening in the second support member". However, the screw 83 of Koros, which is the element that has construed as "a pin", does not include "a handle". Moreover, the Office Action does not set forth any grounds whatsoever as to how Koros discloses a retractor pin having a handle. Although the Office Action refers to the boss 36 extending from the upper portion 44 of the Koros device as "a handle portion", the boss 36 is not in any way associated with the screws 83. Accordingly, a *prima facie* case of anticipation has not been established with regard to claim 74.

Claim 80 recites that "the first and second support members defining the first and second openings that receive the first and second pins also define the first and second enlarged edges of the retractor body". However, the feature 82 of Koros, which the Office Action has construed as "a supporting member" that supports the screw 83, does not also define the features 58, which the Office Action has construed as "first and second enlarged edges".

Additionally, claim 83 recites that "one of the first and second pins includes external threads that are threadingly engaged with internal threads defined by a corresponding one of the first and second support members". However, the screws 83 of Koros do not include external threads that are threadingly engaged with internal threads defined by the guides 82 of the blade portion 64, which are the features that have been construed as "supporting members".

Rewritten Independent Claims 79 and 81 and Dependent Claims 84 and 85

Rewritten independent claims 79 and 81 each recite, among other elements and features, a retractor body including having enlarged edges and defining a channel therebetween, and a retractor blade received within the channel and nested between and engaged with the enlarged edges, and "wherein the retractor blade includes a distractor tip sized and shaped for insertion into an intervertebral space for distraction of the intervertebral space, the distractor tip having a width corresponding to a distracted height of the intervertebral space and a rounded distal end transitioning to the width of the distractor tip to facilitate the insertion into and the distraction of the intervertebral space".

As indicated above, page 2 of the Office Action asserts that "[t]he device also has a distractor tip (60) to facilitate insertion." However, the distal end of the blade 54 is not "a

distractor tip sized and shaped for insertion into an intervertebral space for distraction of the intervertebral space", and likewise does not have "a width corresponding to a distracted height of the intervertebral space". Indeed, as shown in Figure 5, the curled end 60 of the blade 54 has a width that is significantly larger than the disc 98 and the intervertebral space between the adjacent vertebrae 94, 96, and is therefore not in any way intended to distract the intervertebral space. Instead, the lower end of the blade 54 "has the usual curled end 60 to assist in holding tissue away from the surgical site". (Column 6, lines 2-3). Furthermore, the curled end 60 does not include "a rounded distal end transitioning to the width of the distractor tip to facilitate the insertion into and the distraction of the intervertebral space". As illustrated in Figure 5 of Koros, the curled end 60 does not constitute "a rounded distal end transitioning to the width of the distractor tip", and would certainly not facilitate insertion into and distraction of the intervertebral space, as recited in independent claims 79 and 81.

For at least these reasons, the Applicant submits that Koros does not disclose each of the elements and features recited in rewritten independent claims 79 and 81. Accordingly, the Applicant respectfully requests withdrawal of the rejection of rewritten independent claims 79 and 81 and allowance of the same.

Claims 84 and 85 depend from rewritten independent claims 79 and 81, respectively, and are submitted to be patentable for at least the reasons set forth above in support of the patentability of independent base claims 79 and 81. Additionally, further reasons support the patentability of these claims. Specifically, claims 84 and 85 each recite that "the rounded distal end of the distractor tip defines a convex curvature transitioning to the width of the distractor tip". However, as illustrated in Figure 5, the curled end 60 of the blade 54 defines a concave curvature extending across the width of the curled end 60, and does not include "a convex curvature" transitioning to the width of a distractor tip, as recited in claims 84 and 85.

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CONCLUSION

In view of the foregoing amendments and remarks, it is respectfully submitted that the Applicant's application is now in condition for allowance with pending claims 50-55, 63-68, 70, 71, 73-78, 80 and 82-85.

Reconsideration of the subject application is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

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